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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-1407

ALFRED C. YSRAEL,
Petitioner,

vs.

GUAM FEDERATION OF TEACHERS, LOCAL 1581 OF THE AMERICAN FEDERATION OF TEACHERS, a corporation, CONRAD G. STINSON, ROBERT W. KLITZKIE, JAMES R. DOAK, WILLIAM K. BUNYAN, MARY J. KIMBROUGH, PEGGY CLEVELAND, and ROBERT W. COBLE,
Respondents.

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

SUMMARY OF ARGUMENT

In this libel action, Petition for Writ of Certiorari should be denied.

There is no conflict between the decisions of the District of Columbia, Fifth, Eighth and Ninth Circuits on the manner in which a trial judge should determine motions for summary judgment, directed verdict and judgments n.o.v. (in libel actions). The Ninth Circuit's decision in the case at bar was likewise not in conflict with United States Supreme Court decisions. All of the decisions cited by Petitioner are distinguishable from the instant case. In none of the cases cited by Petitioner was the role of a trial judge in motions for summary judgment, directed verdict, etc., changed or expanded to allow a trial judge to weigh witness or evidence credibility. A careful examination of the cases cited by Petitioner will show that evidence credibility was nowhere weighed, nor inferences therefrom chosen. In all of these cases, the courts involved looked to the record to see only if clear evidence of "actual malice" had been offered—weight, credibility, and inference-choosing was not indulged in by the respective courts involved.

It is to be further noted that nowhere does Petitioner attack, question or evaluate the sufficiency of the evidence as to "actual malice" in the instant case. This is tantamount to conceding that the evidence on actual malice was constitutionally sufficient to go to the jury. Rules of the Supreme Court, Rule 23(1)(c). In his Petition for Writ of Certiorari, Petitioner carefully limited the issue under review to one: that a trial judge in a libel action has the power to weigh credibility on motions for summary judgment, directed verdict, etc., and *not* view the evidence in the

light most favorable to the non-movant with all inferences to be drawn therefrom. Petitioner would have the trial judge replace the jury as fact-finder in libel actions.

ARGUMENT

THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE ROLE OF A TRIAL JUDGE ON MOTIONS FOR SUMMARY JUDGMENT, DIRECTED VERDICT, ETC.

What Petitioner sees as conflict between the Circuits (on the question of whether or not a District Court judge has the authority to weigh evidential credibility on motions for summary judgment, directed verdict, etc. in libel actions) is not conflict on the general principle, but rather on the specific factual circumstances in each case. All cases cited by Petitioner in his Petition for Writ of Certiorari are distinguishable from the case at bar.

Petitioner cites the *concurring* opinion in *Wasserman v. Time, Inc.*, 424 F.2d 920 (D.C. Cir. 1970) cert. den. 398 U.S. 940, 90 S. Ct. 1844 (1970). A concurring opinion is mere *obiter dicta*, as was noted in the United States Court of Appeals for the Ninth Circuit's Opinion in the case at bar (p. 4) (hereinafter referred to as "Opinion"). Nothing in the ruling opinion in *Wasserman*, supra, could be construed as endorsing the view that the trial judge has the authority to weigh witness credibility on motions for summary judgment, directed verdict, etc., in libel actions, or any other actions, for that matter. It is to

be further noted that in *Wasserman,* supra, granting of motion for summary judgment was reversed.

Bon Air Hotel, Inc. v. Time, Inc., 295 F.Supp. 704 (1969) aff'd 426 F.2d 858 (5th Cir. 1970) ended at the summary judgment stage. Judge Wright's concurring opinion in *Wasserman,* supra, was quoted in *Bon Air,* supra. Respondents can do no better than repeat what was said in the Opinion in the case at bar (Opinion p. 4f):

> "Judge Wright's views were followed by the Fifth Circuit in *Bon Air Hotel, Inc. v. Time, Inc.,* 5 Cir. 1970, 426 F.2d 858, 864-5. We are not sure, however, as to just how far the court actually went. It summarized the legal position:
>
> "'Numerous courts have found summary judgment for publishers proper where the record is devoid of genuine issues of fact as to whether the alleged defamatory statement was published with actual knowledge of its falsity or with a reckless disregard of whether it was true or false. Other courts, however, have not allowed a publisher's motion for summary judgment where facts were presented from which a jury could find that a statement was made with actual malice.' (Footnotes omitted).
>
> "We note that this language does not include a reweighing of the evidence, including credibility of witnesses; it merely states the usual rule to be followed when summary judgment is involved. The court's analysis of the facts (pp. 865-7) is similar. It concludes:
>
> "'We are convinced that Bon Air has not presented issues of fact *from which a jury could find* that Time published the article with actual

knowledge of its falsity or with a reckless disregard as to whether or not it was false.[21]" (Emphasis added)

"The footnote reads:

"'21. The following statement by Judge Tuttle in *McLaney (Time, Inc. v. McLaney,* 5 Cir. 1969, 406 F.2d 565) seems pertinent here:

"'"Where * * * it is plain that the record has been fully developed by deposition and affidavits on a motion for summary judgment, and such record demonstrates that, construing all of the facts and inferences to be drawn therefrom in favor of the party against whom the judgment is entered, he would not be entitled to have a jury verdict stand, we have not hesitated to hold that the grant of summary judgment is proper." 406 F.2d at 571-572.'

"We find no hint in this language that the judge is to weigh credibility, or to refuse to give a party the benefit of inferences that can legitimately be drawn by a jury. However, because the court did cite and quote from Judge Wright's opinion, we assume that the court in fact went through the exercise that Judge Wright suggests . . ."

Judge Wright's concurring opinion in *Wasserman,* supra, then, continued to be no more than *obiter dicta* in *Bon Air,* supra.

That the Fifth Circuit did not consider the *Wasserman,* supra, concurring opinion as ruling, is reflected in their decision in *Time, Inc. v. Ragano,* 427 F.2d 219 (5 Cir. 1970), decided a mere month after *Bon*

Air, supra. In *Ragano,* supra, the court stated (427 F.2d 221):

> *"In view of the principle that all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion for summary judgment* (cases cited), and in light of the fact that all the Time, Inc. employees knew that Ragano was an attorney, we think that a genuine issue of material fact exists as to whether Time's conclusion that Ragano could journalistically be referred to as a top Cosa Nostra hoodlum was made in good faith or with malice. Therefore, summary judgment was properly denied. Fed. R. Civ. P. 56(c) . . ." (Emphasis added).

Weighing of witness credibility was nowhere mentioned.

See, also, *Vanderburg v. Newsweek, Inc.,* 441 F.2d 378 (5 Cir. 1971), cert. den. 404 U.S. 864 (1971).

Berry v. National Broadcasting Co., Inc., 480 F.2d 428 (8 Cir. 1973), U.S. app. pndg., 42 U.S.L.W. 3151 (U.S. 9/11/73, No. 73-467), cited by Petitioner, does not mention weighing witness *credibility.* In *Berry,* supra, the court listed the proofs whereby plaintiff therein based his case for actual malice. The court did not weigh these proofs as to their credibility. It made no findings whatever as to the truth or falsity of the proofs offered.

The court stated (480 F.2d 433):

> "Proof of the factual inaccuracies and omissions committed by National Broadcasting Company was addressed to proving a reckless disre-

> gard for the truth by the showing of numerous untruths, as was done in *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). However, we hold that the proof that persons did infer that . . . Berry was the wrongful beneficiary of the double standard, and the proof of *irrelevant* inaccuracies, together fall short of establishing the 'malice' needed to sustain a verdict against a broadcaster in light of the dictates of the First Amendment." (Emphasis added).

The court's list of proofs offered at the trial contained no items which would show knowing or reckless disregard for the truth; without proof of that nature, a libel award (for public officials-figures-events) cannot stand. That is one of the essential differences between *Berry,* supra, and the case at bar. In the instant case, proof of actual malice was made—and proven by the testimony of Petitioner himself.

In *Gordon v. Random House, Inc.,* 486 F.2d 1365 (3 Cir. 1973) summary judgment in favor of defendant publisher in a libel action was vacated, and the cause remanded for trial. Said judgment was vacated on the ground that genuine fact issues existed to preclude summary disposition. The district court ruled (a) that the case came under the mantle of the decision in *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 91 S.Ct. 1911, 29 L.Ed.2d 296 (1971); and (b) that as a matter of law the statements were published without actual malice. After discussing and deciding that whether plaintiff Gordon came under the *Rosenbloom* ruling was a matter to be decided on a more

complete trial record, the court stated (486 F.2d 1362f):

> "Only for the purpose of this analysis and for the remainder of this discussion we shall assume the *Rosenbloom* plurality doctrine would be applicable to this case. So postured, our inquiry perforce is confined to an extremely narrow compass: Was there a genuine issue as to 'reckless disregard'? We believe such an issue exists for the following reasons.
>
> "First, we are mindful of *St. Amant v. Thompson,* 390 U.S. 727, 732, 88 S.Ct. 1323, 1326, 20 L.Ed.2d 262 (1968), where the court stated:
>
> "'The defendant in a defamation action . . . cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true . . . (The defendant will not) be likely to prevail when the (author's) . . . allegations are so inherently improbable that only a reckless man would have put them in circulation.'
>
> Random's affidavits state that it published with the belief that the statements concerning Gordon were true; however, it carefully avoided any statement as to whether it published with the belief that 'Earl's' (another person discussed in the book) were true. Therefore, the reasoning of *St. Amant* applies, *a fortiori,* to this case and the inherent improbability of 'Earl's' statements becomes a crucial factual inquiry . . .
>
> ". . . Plaintiff argues that the question of inherent probability of 'Earl's' statement was an issue for the fact finder. The district court determined that there existed no genuine issue

as to the inherent probability of 'Earl's' statements . . .

"We believe that the district court's resolution of this question constituted an invasion into the province of the fact finder.

"Second, Random relied upon (author) Berson's representation that the factual statements . . . concerning Max Gordon were based on an actual interview plus information . . . in the public press. Random . . . made no attempt at corroboration. Gordon has denied any interview with Berson . . . Moreover, Random's affidavits do not reveal whether Berson represented that she interviewed 'Earl' or whether Random sought such assurance from her. Yet Random's advertisement on the book jacket referred to 'actual interviews.'

"The publisher asserts that it was required to do more than take its author's word at face value. The plaintiff counters that because the publisher advertised that the book's contents were based on actual interviews, it should have conducted an investigation. *Evaluation of detailed evidence supporting each of these contentions was more properly the province of the fact finder, rather than the court. Inferences to be drawn therefrom were not for the litigants, not for the court, but solely for the fact finder . . .*" (Emphasis added)

In *Goldwater v. Ginzburg*, 261 F.Supp. 784 (1966), 414 F.2d 324 (2 Cir. 1969) cert. den. 396 U.S. 1049, 90 S.Ct. 701 (1969), summary judgment was unsuccessfully sought by defendant publisher Ginzburg (261 F.Supp. 784). At trial, defendant's motions for directed verdict and judgment n.o.v. were denied, and

Ginzburg appealed. Stated the Second Circuit Court, in its decision affirming the verdict and denials of the above-mentioned motions (414 F.2d 336f):

> "To show appellants' (Ginzburg et al.) state of mind and lack of good faith, at the hearing on the motion for summary judgment the appellee relied on circumstantial evidence which appellee maintained cumulatively might lead a jury reasonably to conclude that appellants published . . . with actual malice . . . After considering this material the trial court stated *that a jury might infer actual malice from it,* and the judge set it forth seriatim in his opinion . . . As can be seen, appellee and the district judge did not rely on a few isolated instances of derogatory statements which could be charitably thought of as being nonactionable, negligent or good faith misstatements of fact, but rather upon the totality of appellants' conduct, as evidenced by the proffered materials, from which *a jury might find* a predetermined and preconceived plan to malign the Senator's character. The fact that appellants' supporting affidavit denied that the 'Goldwater Issue' had been published with actual malice does not require that their motion for summary judgment be granted, especially in light of appellee's countering materials. *St. Amant v. Thompson,* 390 U.S. 727, 732, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968) . . .
>
> *"Viewing the submitted materials and the inferences which might be drawn from them 'in the light most favorable to the party opposing the motion' United States v. Diebold, Inc.,* 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962), *the district court properly concluded that a trier*

of fact should have the opportunity to decide whether appellants were liable to appellee . . ." (Emphasis added)

NINTH CIRCUIT OPINION DOES NOT CONFLICT WITH SUPREME COURT DECISIONS

Petitioner quotes a portion from the decision in *New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, 95 A.L.R.2d 1412 (1964) as supportive of his position. The Ninth Circuit Court, in its Opinion herein, quoted the same portion and included the footnote thereo. Respondents can do no better than to respect the distinguishing of *New York Times* from the case at bar.

> "In *New York Times,* supra, 376 U.S. at 284-6, The Court said:
>
> "'Since respondent may seek a new trial, we deem that consideration of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied . . . We must "make an independent examination of the whole record," *Edwards v. South Carolina,* 372 U.S. 229, 295, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.'

"And in a footnote, the Court commented on the relationship between such an examination and the constitutional right to jury trial:

"'26. The Seventh Amendment does not, as respondent contends, preclude such an examination by this Court . . . But its ban on re-examination of facts does not preclude us from determining whether governing rules of federal law have been properly applied to the facts. "(T)his Court will review the finding of facts by a State court . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." *Fiske v. Kansas,* 274 U.S. 380, 385-396. See also *Haynes v. Washington,* 373 U.S. 503, 515-516.'

"We find nothing in this language to indicate that the Court's examination was to disregard the usual rules for determining whether a case should go to the jury. *It merely requires a re-examination as to whether the evidence, viewed most favorably to the plaintiff, is sufficient to meet the New York Times standard if the jury accepts it . . .*" (Emphasis added)

Rosenblatt v. Baer, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966) is cited as supportive of Petitioner herein. The Ninth Circuit Court distinguished that case from the one at bar, saying on page 6 of Opinion:

"*Rosenblatt v. Baer,* 1966, 383 U.S. 75, 88, deals with privilege—whether the evidence shows the plaintiff to be a public official. It says nothing

about how the trial judge is to view the evidence in making that determination."

The section quoted by Petitioner (383 U.S. 87f) is prefaced by the following sentence:

". . . Moreover, even if the claim falls within *New York Times,* the record suggests respondent may be able *to present a jury question of malice* as there defined . . ." (383 U.S. 87) (Emphasis added)

The role of the trial judge in determining motions for summary judgment, directed verdicts, etc., is nowhere touched upon in the *Rosenblatt* decision, or in the concurring and dissenting opinions thereto.

In *Time, Inc. v. Pape,* 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed.2d 45 (1971), reh. den. 401 U.S. 1015, 91 S.Ct. 1248 (1971), nothing was stated to indicate that a trial judge could or should weigh witness credibility on motions for summary judgment, directed verdict, etc., in libel cases. The court stated therein:

"In light of the totality of what was said in justice, we cannot agree that . . . Time engaged in a 'falsification' sufficient in itself *to sustain a jury finding* of *'actual malice'* . . ." (401 U.S. 289) (Emphasis added)

Petitioner cites *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 91 S.Ct. 1811 (1971) as supportive. The portion of the Rosenbloom decision quoted by Petitioner distinguishes it from the instant case:

"Our independent analysis of the record leads us to agree with the Court of Appeals that none

> of the proofs, considered either singly or cumulatively, satisfies the constitutional standard with the convincing clarity necessary *to raise a jury question* whether the defamatory falsehoods were broadcast with knowledge that they were false or with reckless disregard of whether they were false or not." (403 U.S. 55) (Emphasis added).

The *Rosenbloom* case did not expand the trial judge's power on a motion for directed verdict from determining if evidence sufficient to prove actual malice was offered, to *weighing* the truth or falsity of that evidence.

Petitioner cites the *dissenting* opinion of Justice Douglas in *Dun & Bradstreet v. Grove,* 404 U.S. 898, 30 L.Ed.2d 175, 92 S.Ct. 204 (1971). Certiorari in that case was denied. It is to be noted that Justice Douglas has consistently held that libel actions have no place whatever in American law.

Of the ten cases listed in the footnote to the portion quoted by Petitioner, *Rosenbloom, Time, Inc. v. Pape, Rosenblatt* and *New York Times* have already been dealt with. A careful reading of the other seven decisions will show that nowhere was the credibility of the evidence considered by the U.S. Supreme Court, and in none of those decisions was the trial judge advised to do so, i.e., the trial judge's role vis-a-vis motions for summary judgment, directed verdict, etc., was *not* expanded to replace the jury as fact-finder. *Monitor Patriot v. Roy,* 401 U.S. 265 (1971), reversed a libel judgment for inadequate or improper instruction(s) as to actual malice; similarly with *Greenbelt*

Corp. Pub. Assn. v. Bresler, 398 U.S. 6 (1970), and *Beckley Newspapers v. Hanks,* 389 U.S. 81 (1967). *Associated Press v. Walker,* 388 U.S. 130 (1967), reversed a libel judgment for lack of proper instructions as to actual malice and *lack of proof offered* to support a finding therefor (the evidence was not weighed —there was none); the libel award in *Curtis v. Butts,* 388 U.S. 130 (1967) was affirmed. The jury instructions therein were held to have properly encapsulated the *New York Times* rule. In *St. Amant v. Thompson,* 390 U.S. 727 (1968), no proof had been *offered* which would go towards proving "knowing and reckless disregard." The Supreme Court, in these cases, did not "weigh the evidence" in the fact-finding sense, but only to determine if such evidence as would prove "actual malice" *had been offered.* It did not evaluate the evidence, but looked to the record to find if evidence had been introduced from which an actual malice finding could be made by the jury. The quoted portion of Justice Douglas' dissenting opinion in *Dun & Bradstreet v. Grove,* supra, then, was entirely distinguishable from the instant situation.

CONCLUSION

Respondents have shown above that no conflict exists between the Ninth Circuit Court Opinion herein and other Circuits, or with decisions of the United States Supreme Court. There is therefore no reason why certiorari should be granted. Respondents therefore pray that Petition for Writ of Certiorari to review

the judgment of the United States Court of Appeals for the Ninth Circuit in Guam Federation of Teachers, Local 1581 of the American Federation of Teachers, et al., Plaintiffs-Appellants v. Alfred C. Ysrael, Defendant-Appellee, No. 73-1444 be denied.

Dated, Agana, Guam,
May 31, 1974.

DAVID M. SHAPIRO,
Attorney for Respondents.